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No. 97-208

In the Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL ACADEMY OF SCIENCES, PETITIONER

v.

ANIMAL LEGAL DEFENSE FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a committee established by the National Academy of Sciences was "utilized" by a federal agency, within the meaning of the Federal Advisory Committee Act, 5 U.S.C. App. § 1 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 104 F.3d 424. The opinions on denial of rehearing en banc (Pet. App. 37a-41a) are reported at 114 F.3d 1209. The opinion and order of the district court (Pet. App. 15a-36a) are unreported. The prior decision of the court of appeals is reported at 53 F.3d 363.

JURISDICTION

The court of appeals entered its judgment on January 10, 1997. A petition for rehearing was denied on May 6, 1997. Pet. App. 37a. The National Academy

of Sciences filed a petition for a writ of certiorari on August 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Advisory Committee Act (FACA), 5 U.S.C. App. § 1 *et seq.*, regulates committees providing group advice to the Executive Branch. FACA defines an "advisory committee," in part, as:

> any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof * * *, which is —
>
> (A) established by statute or reorganization plan, or
>
> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government * * *.

5 U.S.C. App. § 3(2).

If an agency "establishe[s] or utilize[s]" an advisory committee, the agency must file a charter setting forth the committee's objectives and the scope of its activities. 5 U.S.C. App. § 9(c). In addition, the agency must provide advance notice in the Federal Register of committee meetings, keep minutes of each meeting, and make committee records available to the public in accordance with the Freedom of Information Act, 5 U.S.C. 552. 5 U.S.C. App. § 10(a)(2), (b) and (c). Committee meetings must be open to the public, unless one of the exceptions

enumerated in the Government in the Sunshine Act, 5 U.S.C. 552b(c), applies. 5 U.S.C. App. § 10(a)(1) and (d). A federal officer must preside over or attend every committee meeting. 5 U.S.C. App. § 10(e). Prior to any meeting, the federal officer must approve the scheduling and agenda of the meeting. 5 U.S.C. App. § 10(f). See generally 41 C.F.R. 101-6.1001 to 101-6.1035.

2. Pursuant to the Animal Welfare Act, 7 U.S.C. 2131 *et seq.*, the Department of Agriculture promulgates nationwide standards for the treatment of animals in all research facilities. The regulations promulgated by the Department of Agriculture establish the minimum requirements for laboratory animal welfare. See 7 U.S.C. 2143(a)(2); 9 C.F.R. 1.1 to 4.11. Those regulations refer to some of the recommendations of the National Academy of Science's "Guide for the Care and Use of Laboratory Animals" (Guide). See Pet. App. 2a; 56 Fed. Reg. 6428 (1991).

Although the Department of Health and Human Services (HHS) does not administer the Animal Welfare Act, HHS does provide federal funding, through contracts and grants, for biomedical and behavioral research. 42 U.S.C. 284, 287, 287a. HHS requires all research facilities receiving HHS funding to abide by both the Department of Agriculture's Animal Welfare Act regulations and additional HHS guidelines regarding the treatment of laboratory animals. 42 U.S.C. 289d; 48 C.F.R. PHS 352.280-2, 380.201 to 380.206. HHS has adopted the Guide as a major component of its animal welfare regulations. See, *e.g.*, 48 C.F.R. PHS 380.205(a)(1) and (c); see also Pet. App. 2a.

The Interagency Research Animal Committee, which is composed of representatives from each federal agency that uses animals in research, issues a

government-wide publication known as the *Principles for the Utilization and Care of Vertebrate Animals Used in Testing, Research and Training.* Pet. App. 2a. That publication also refers readers to the Guide as an "aid to the interpretation and execution of the *Principles.*" *Ibid.*

3. The National Academy of Sciences was chartered by Congress in 1863. See 36 U.S.C. 251, 1101. The federal government has no seats on the Academy's governing board and has no voice in choosing the Academy's officers or in appointing the members of its committees. Academy officers and employees are not persons holding employment or appointment by the United States.

According to its charter, the Academy "shall, whenever called upon by any department of the Government, investigate, examine, experiment, and report upon any subject of science or art." 36 U.S.C. 253. Pursuant to that provision, the Academy is frequently called upon by federal agencies to perform studies and investigations. Pet. 1-2; Pet. App. 32a (Academy receives approximately 65% of its funds from projects funded by the federal government). The Academy receives no federal funding or compensation beyond payments for its services pursuant to government procurement contracts, grants, or cooperative agreements. See 36 U.S.C. 253; C.A. App. 181. In addition to its substantial work for the federal government, the Academy does some studies for state governmental agencies and private entities and undertakes projects on its own initiative. *Lombardo* v. *Handler*, 397 F. Supp. 792, 794-795 (D.D.C. 1975), aff'd, 546 F.2d 1043 (D.C. Cir. 1976) (Table), cert. denied, 431 U.S. 932 (1977).

The Academy's principal operating arm is the National Research Council (Research Council). One subcomponent of the Research Council is the Institute of Laboratory Animal Resources (Institute). The Academy's Research Council and the Institute produce the "Guide for the Care and Use of Laboratory Animals." Pet. App. 2a.

4. The Academy's efforts to revise the Guide underlie the present litigation. In 1991, the Institute first considered revising the Guide. The Academy convened a meeting at which Academy members, scientists, and representatives of six federal agencies unanimously agreed that the Guide should be revised. Pet. App. 3a, 16a-17a. The Academy subsequently submitted a grant application to HHS seeking funding for a revision of the Guide. The proposal indicated that a committee would be formed to revise the Guide (Revision Committee). HHS subsequently authorized the grant, and the Academy selected a group of fifteen people to serve on the committee. *Id.* at 17a.[1]

5. In May 1994, the Animal Legal Defense Fund, Psychologists for the Ethical Treatment of Animals, and the Association of Veterinarians for Animal Rights (collectively, the Fund) filed suit against HHS alleging that the Academy's Revision Committee is an "advisory committee" subject to FACA. Pet. App. 17a-18a. The Academy subsequently intervened in the action as a co-defendant. *Id.* at 18a. The Fund's motion for a preliminary injunction to halt the Revision Committee's meetings was denied by the district

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[1] One individual, Kathryn Bayne, D.V.M., Ph.D., was invited by the Academy to serve on the Revision Committee while she was an employee of HHS. Dr. Bayne left federal employment in May 1994. C.A. App. 326-327.

court. The court of appeals dismissed the Fund's appeal of the denial of a preliminary injunction as moot after the Revision Committee concluded its last meeting. *Id.* at 3a; *Animal Legal Defense Fund* v. *Shalala*, 53 F.3d 363 (D.C. Cir. 1995).[2]

The district court granted summary judgment in favor of the federal agencies and the Academy, holding that the agencies neither "established" nor "utilized" the Revision Committee, within the meaning of FACA. Pet. App. 15a-36a. The court of appeals reversed. *Id.* at 1a-14a. The court of appeals held that, when a committee is established by a "quasi-public" entity and receives federal funds, and when an agency uses the committee's work product, it is subject to FACA regardless of whether the agency requested committee advice or managed and controlled the committee *Id.* at 7a-14a. The court of appeals relied heavily on this Court's decision in *Pubiic Citizen* v. *Department of Justice*, 491 U.S. 440 (1989).

Both the Academy and the federal agencies filed petitions for rehearing and suggestions of rehearing en banc, which the court of appeals denied. Pet. App. 37a-39a. The author of the panel opinion, Judge Silberman, explained in an opinion concurring in the denial of rehearing en banc that some of the Academy's concerns about FACA's requirements (such as the duty to ensure that committee membership is fairly balanced) were misplaced, because not all of FACA's obligations apply to committees "utilized," but not "established," by a federal agency. *Id.* at 41a

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[2] Upon remand, the Department of Agriculture was added as a defendant. Gov't C.A. Br. 21 n.6 (quoting 10/25/94 Tr. 46 (C.A. App. 318)).

n.1. Judge Wald and Judge Tatel dissented from the denial of rehearing en banc. *Id.* at 41a.

ARGUMENT

The federal respondents disagree with the court of appeals' decision in this case and share many of petitioner's objections to the court's reasoning. Nevertheless, because (i) the court of appeals' decision was guided by its understanding of this Court's statements regarding the Academy's status in *Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989), (ii) the facts of this case do not present the most typical interaction of Academy committees with federal agencies, and (iii) the implications of the court of appeals' ruling for the federal government's and the Academy's operations cannot yet be fully assessed, review by this Court is not warranted at this time.

1. The federal respondents, like petitioner, believe that the decision of the court of appeals is erroneous. In *Public Citizen*, this Court held that the President and the Justice Department did not "utilize" the American Bar Association's Standing Committee on the Federal Judiciary (ABA Committee), within the meaning of FACA, in making judicial appointments. See 491 U.S. at 452-467. The Court concluded that a literal interpretation of the term "utilized" would extend FACA far beyond the scope intended by Congress, and thus rejected the argument that an agency "utilizes" a committee whenever it "makes use of" its work or recommendations. *Id.* at 452. Instead, the Court looked to whether the committee had been formed "at the Federal Government's prompting," received federal funds, and was "amenable to strict management by agency officials." *Id.* at 457-458.

In this case, the Revision Committee of the National Academy of Sciences was not formed "at the Federal Government's prompting." *Public Citizen*, 491 U.S. at 457. To the contrary, the Academy independently and of its own initiative chose to revise the Guide through use of a committee process. See Pet. App. 3a, 16a-17a, 23a. Nor was the Revision Committee subjected to "strict management by agency officials." *Id.* at 5a ("It is indisputable that no government agency could be thought to exercise that degree of influence over the Guide Committee."). Finally, the only federal funding provided the Revision Committee came in the form of a grant to the National Academy of Sciences. *Id.* at 3a. FACA, however, does not apply to advice provided pursuant to a government contract. See *Food Chemical News* v. *Young*, 900 F.2d 328 (D.C. Cir.) (FACA does not apply to private government contractor), cert. denied, 498 U.S. 846 (1990).

2. Notwithstanding the considerations just discussed that weigh against a holding that federal agencies "utilized" the Revision Committee, we do not urge the Court to grant review.

a. The court of appeals considered itself bound by this Court's prior statements regarding the Academy's status in *Public Citizen*. See Pet. App. 5a-7a, 8a ("[W]e are in no position, hierarchically, to reject the [Supreme] Court's approach."), 10a. In *Public Citizen*, this Court repeatedly contrasted the ABA Committee with committees created by the Academy, which the Court characterized as the "paradigmatic example of a committee 'utilized' by an agency." 491

U.S. at 460.[3] The Court noted that such committees, unlike the ABA Committee, were "established by a quasi-public organization in receipt of public funds." *Ibid.* The Court then quoted a passage from a House Report that was prepared prior to the Congress in which FACA was enacted, which stated that "[a] great number" of Academy committees "possibly should be added to" the list of then-existing advisory committees because "the [Academy] committees fall within the intent and literal definition of advisory committees under Executive Order 11007." *Id.* at 460 n.11 (quoting H.R. Rep. No. 1731, 91st Cong., 2d Sess. 15 (1970)). Executive Order No. 11,007 (3 C.F.R. 573 (1959-1963)), to which the House Report referred, governed the operation of advisory committees prior to FACA's enactment and served as the lodestar in the Court's opinion for articulating when an agency "utilizes" a committee within the meaning of FACA. See, *e.g.*, *Public Citizen*, 491 U.S. at 457.[4]

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[3] The Academy, however, was not a party to the *Public Citizen* case, and the Court's statements were made without the benefit of full briefing on the Academy's status.

[4] As the earlier House Report observed, most Academy committees were not reported by federal agencies as advisory committees under Executive Order No. 11,007. See 491 U.S. at 460 n.11 (quoting H.R. Rep. No. 1731, *supra*, at 15). To the extent that the definition of an advisory committee in FACA was intended to incorporate the scope of Executive Order No. 11,007 (see 491 U.S. at 457, 460, 462-463), the practice under that Order cuts against finding that Academy committees are covered by FACA.

Public Citizen also noted that the Senate Report on the Senate version of the FACA bill described the committees that would have been covered, beyond those established by an agency, as "groups organized by, or closely tied to, the Federal Government, and thus enjoying quasi-public status," such as

Public Citizen also discussed the lack of evidence in the Conference Report that private groups should be swept within FACA's terms, in contrast to committees "formed * * * by quasi-public organizations whose opinions the Federal Government sometimes solicits." *Public Citizen*, 491 U.S. at 462. The Court then concluded that

> [t]he phrase "or utilized" therefore appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the [Academy] "for" public agencies as well as "by" such agencies themselves.

Ibid.; see also *id.* at 462-463. That construction of "utilized," the Court continued, would comport with what it found to be the legislative intention to include committees "whether those groups were established by the Executive Branch or by statute or whether they were the offspring of some organization created or permeated by the Federal Government." *Id.* at 463. The Court determined, however, that the ABA Committee was not "utilized" because it was not formed by an agency "or by some semiprivate entity

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"committees of the national academies where they are utilized and officially recognized as advisory to the President, to an agency, or to a Government official." 491 U.S. at 461 (quoting S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972)). The Senate definition was rejected, however, in favor of the House version, which, *inter alia*, was not intended to apply to organizations having a contractual relationship with an agency. H.R. Conf. Rep. No. 1403, 92d Cong., 2d Sess. 9-10 (1972); see generally *Lombardo*, 397 F. Supp. at 797-800.

the Federal Government helped bring into being." *Ibid.*[5]

A grant of a writ of certiorari is thus not warranted in this case on the ground that the court of appeals disregarded or failed to apply this Court's precedents. At the same time, we do not believe that the court's discussion of the legislative materials in *Public Citizen* must be read to embrace as broad a group of Academy committees as the court of appeals' decision apparently does. Nevertheless, if this Court continues to believe, in accord with the statements in *Public Citizen*, that a significant number of Academy committees are "utilized" by federal agencies within the meaning of FACA, then review by this Court is unnecessary. Only if this Court were prepared fundamentally to reconsider its statements about the Academy, based on a more complete presentation of the issue than was before the Court in *Public Citizen*, would review be warranted.

b. In a number of ways, moreover, this case is not representative of how federal agencies most commonly interact with the Academy. For that reason, it might not provide the most appropriate vehicle for a full-scale reconsideration of *Public Citizen*'s statements regarding the status of Academy committees under FACA. First, in this case, no agency sought

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[5] The concurring Justices (Justice Kennedy, joined by the Chief Justice and Justice O'Connor) did not dispute the majority's view that the term "utilized" embraced committees "formed indirectly by quasi-public organizations such as the National Academy of Sciences," but would have endorsed a more expansive construction of the term that would have reached the ABA Committee. *Public Citizen*, 491 U.S. at 482. The concurring Justices ultimately agreed with the judgment on constitutional grounds. *Id.* at 482-489.

out the Academy's advice. To the contrary, the Academy approached HHS and the Department of Agriculture with an unsolicited request for a grant to cover the costs of the Revision Committee's work. Pet. App. 17a, 21a-23a. As the Academy's petition notes (Pet. 2, 7-8), the more common practice is for federal agencies affirmatively to call upon the Academy for advice and reports. While the fact that the government agencies did not initiate or seek out the committee's advice in this particular case underscores the erroneousness of the court of appeals' ruling, those circumstances do not arise with sufficient frequency to merit review in their own right.

Petitioner also contends (Pet. 11-13) that Congress did not intend for the term "utilized" to embrace government contracts. We agree with that reading of FACA. See also *Food Chemical News* v. *Young*, *supra*. This case, however, involves a grant agreement, not a government procurement contract. Compare 31 U.S.C. 6303(1) (agency enters into a procurement contract when the "principal purpose" of the funding is to acquire research services "for the direct benefit or use of the United States Government") with 31 U.S.C. 6304(1)-(2) (agency provides a grant when the "principal purpose" of the research is to benefit the general public interest and when "substantial involvement is not expected between the executive agency and the * * * recipient when carrying out the [grant] activity"); see also *Forsham* v. *Harris*, 445 U.S. 169, 180 (1980). Although procurement contracts and grant agreements are similar in many respects and receive similar treatment under some federal laws (see, *e.g.*, *Henke* v. *Department of Commerce*, 83 F.3d 1445, 1449-1453 (D.C. Cir. 1996)), the rules and regulations governing the administra-

tion of grants and procurement contracts are distinct.[6]

c. There is no conflict in the courts of appeals on the standard to be applied in determining generally whether a federal agency has "utilized" a committee within the meaning of FACA. The standard that the D.C. Circuit has applied to identify "utilized" committees, outside the context of Academy committees, is correct and consistent with *Public Citizen*, and has proved workable. See *Washington Legal Found.* v. *United States Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994); *Food Chemical News*, *supra*. Nor is there a circuit conflict on whether a committee established by a federally chartered corporation or "quasi-public" entity is subject to FACA. The decision below is the only court of appeals ruling on that issue thus far. Because the vast majority of FACA litigation and litigation against the Academy arises within the D.C. Circuit, however, the lack of a circuit conflict does not weigh strongly against further review.[7]

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[6] See generally 48 C.F.R. Parts 3, 9, 24, 35, 303, 309, 324 (regulating government contractors); 45 C.F.R. Part 74 (regulating grant recipients).

[7] Unlike *Public Citizen*, 491 U.S. at 465-467, this case presents no important constitutional question that would independently merit this Court's consideration, even in the absence of a circuit conflict. The Academy asserts a potential First Amendment right of association in its petition. Pet. 11 n.4. That argument was not raised below and was not addressed by the court of appeals. Ordinarily, "[i]t is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) (plurality opinion); see also *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992).

d. Finally, review by this Court would be premature because the implications of the court of appeals' decision for agency operations have not yet fully crystallized. In response to the government's and the Academy's petitions for rehearing, Judge Silberman indicated that some of FACA's provisions would not apply to Academy committees. See Pet. App. 41a n.1. Further clarification of whether and how FACA's provisions apply to various Academy committees may thus mitigate some of the operational concerns voiced in the Academy's petition (*e.g.*, Pet. 6). For example, petitioner correctly notes (Pet. 21) that, in light of the court of appeals' decision in this case, one district court has enjoined a federal agency from relying upon the work product of an Academy committee. *Natural Resources Defense Council, Inc.* v. *Curtis*, No. 97-0308 (PLF) (D.D.C. Aug. 6, 1997). The government is currently appealing that injunction, however, because it is inconsistent with FACA's language, legislative history, and purpose, and is in conflict with the rulings of almost every court that has addressed the question, including prior decisions of the D.C. Circuit.[8] The practical effects of the court of appeals'

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[8] See, *e.g.*, *National Nutritional Foods Ass'n* v. *Califano*, 603 F.2d 327, 336 (2d Cir. 1979); *Northwest Forest Resource Council* v. *Espy*, 846 F.Supp. 1009, 1014-1015 (D.D.C. 1994); *Center for Auto Safety* v. *Tiemann*, 414 F. Supp. 215, 226 (D.D.C. 1976), aff'd in part and remanded in part, 580 F.2d 689 (D.C. Cir. 1978); see also *California Forestry Ass'n* v. *Forest Service*, 102 F.3d 609, 614 (D.C. Cir. 1996); *American Petroleum Inst.* v. *Costle*, 665 F.2d 1176, 1189-1190 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982); *Metcalf* v. *National Petroleum Council*, 553 F.2d 176, 181 n.53 (D.C. Cir. 1977); cf. *Physicians' Educ. Network, Inc.* v. *Department of Health, Educ. & Welfare*, 653 F.2d 621, 623-624, 626-627 (D.C. Cir. 1981); *Idaho Farm Bureau Federation* v. *Babbitt*, 900 F. Supp. 1349, 1364-

decision thus can be ascertained only as the Academy and federal agencies assess their operating procedures in light of that decision, and as the court of appeals is given the opportunity to clarify the scope and impact of its ruling.

We appreciate and share the Academy's interest in ensuring separation and independence between the Academy and federal agencies and in preserving the integrity of its processes. We do not, however, concur in the Academy's assertion (*e.g.*, Pet. 6-7) that the presence of a government employee at meetings must compromise the quality, independence, or objectivity of the Academy's work. Government scientists and other experts have frequently offered distinguished service to Academy committees, with none of the untoward consequences that the Academy predicts. Indeed, as initially constituted, the committee in this case included an HHS employee. See note 1, *supra*. The Academy also invited six federal agency officials to its first meeting. Pet. App. 17a; see also *id.* at 25a-26a. Petitioner's concerns about the prospective impact of interaction with federal employees on its operations are thus premature.

1367 (D. Idaho 1995). But see *Alabama-Tombigbee Rivers Coalition* v. *Department of Interior*, 26 F.3d 1103 (11th Cir. 1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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